

No. 14816

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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WILLIAM LEVECKE and REED LEVECKE, doing business  
as THE LEVECKE COMPANY,

*Appellants,*

*vs.*

GRIESEDIECK WESTERN BREWERY Co., a corporation, and  
CARLING BREWING Co., a corporation,

*Appellees.*

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## APPELLANTS' REPLY BRIEF.

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## APPELLANTS' REPLY BRIEF.

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### Statement.

The appellees, in their brief, have discussed several questions of law which are not material to a determination of the issues on this appeal, and we shall not in this brief labor this situation. Stripped of the immaterial matters, the appellees' brief raises four questions:

- (1) That the affidavits filed in the court below were in direct conflict and that therefore there can be no review of the matter on appeal;
- (2) That the evidence does not show that the Griesedieck Western Brewery Co., now known as The Griesedieck Company, solicited business in the State of California;

- (3) That the appellants, without the consent of the Griesedieck Western Brewery Co., held themselves out as the agents of the company;
- (4) That the evidence of the activity of Carling Brewing Co. was not sufficient to show that it was doing business in the State of California.

### Argument.

With reference to the question of conflict in the affidavits in the court below, the affidavit of William R. LeVecke showed the following, which was not denied by any affidavit filed by either Griesedieck Western Brewing Co. or by Carling Brewing Co., commencing at page 64 of the transcript of record:

That in October, 1951, Edward Jones came to California in order to increase the sales of defendant Griesedieck's beer products in this State. The first two days in Los Angeles, Mr. Jones spent in calling upon 40 to 50 supermarkets in the area. These consisted of Alexander Stores, Shopping Bag, Thriftymart and Safeway Stores. The following day Mr. Jones and Mr. LeVecke called on Certified Grocers, a large cooperative.

That Mr. Jones and Mr. LeVecke then went to San Francisco where Mr. Jones contacted Mr. Jack Eagan of the First California Company in an effort to make a contact with Lucky Stores in order to sell Lucky Stores the products of Griesedieck Western Brewery Co.; that in so doing they met Mr. Dardi of the Blair Holding Company who was also Chairman of the Lucky Stores, Incorporated; that at this meeting Mr. Jones attempted to sell his company's beer to the Lucky Stores; that later on the same day they called on Drexel Distributing Company, a subsidiary of Safeway.

In October of 1952, Mr. Jones again came to California. Upon his arrival he, together with Mr. LeVecke, called upon approximately 50 supermarkets that were handling the products of the defendant Griesedieck; that Mr. Jones showed the various managers of the stores called upon ways in which they could increase their sales of the Griesedieck products.

That Mr. Jones then called upon the buyers for Certified Grocers, Shopping Bag, Von's, Thriftymart and others; that he assured these buyers that the brewery was financially sound and showed them the brewer's financial statement, assured them that the beer was on the West Coast to stay and that this was not a fly-by-night operation.

That on this same trip Mr. Jones and Mr. LeVecke went to San Francisco where they called upon United Grocers which had just recently started selling the beer products of Griesedieck; that United Grocers is a large cooperative grocery organization similar to Certified; that Mr. Jones assured Mr. Sorenson, the President of United Grocers, that this was not a temporary setup and that Griesedieck was on the West Coast to stay. He gave Mr. Sorenson a copy of Griesedieck's financial statement.

That they again called upon the Drexel Distributing Company, thanked the President of that Company for past business and gave suggestions for increasing sales of Griesedieck products.

That they again called upon Mr. Eagan and Mr. Dardi in an effort to obtain the Lucky Stores business.

That in October of 1953, Mr. Jones came to California; that Mr. William R. LeVecke met Mr. Jones in Tucson where they started calling on the outlets handling

Stag and Hyde Park beer; that they then called on the Phoenix stores that were handling the products, including Safeway and Bayless Markets; that Mr. Jones delivered to Mr. Bayless a financial statement of the Griesedieck Western Brewery Co.; that following the canvassing of Tucson and Phoenix, they called on supermarkets in the Los Angeles area. Here Mr. Jones presented each manager of the store called upon with a mechanical pencil and discussed with them the sales of defendant's beer products.

The following day Mr. Jones and Mr. LeVecke called upon the buyers of the large chain stores handling the defendant's products in the Los Angeles area. Each buyer was given a Sterling silver opener by Mr. Jones. He called upon the Certified officials together with Mr. LeVecke and they too were presented with Sterling silver openers. Following this Mr. Jones and Mr. LeVecke called upon United Grocers and Safeway in San Francisco. Each official of each company were presented with a silver bottle opener. Mr. Jones and Mr. LeVecke then called upon the Lucky Stores and discussed with the officials of Lucky Stores the defendant's products.

That from 1950 to November 30, 1954, the defendant Griesedieck Western Brewing Co. kept a steady flow of its beer products coming into the State of California.

Not one of these allegations in the affidavit of Mr. William R. LeVecke were denied.

We then have the affidavit of Mr. Reed LeVecke which commences at page 71 of the transcript of record, attached to which commencing at page 75, is Exhibit "A."



On page 77 Mr. Jones points out to his California stockholders in speaking of his 1951 trip to California:

“While there I called upon about 30 supermarkets with our distributor, Mr. William LeVecke, LeVecke Distributing Company, 1807 E. Olympic Blvd., Los Angeles, California.”

and in the same letter on page 78 he says:

“In the event Hyde Park ‘75’ or Stag are not available in your area, won’t you be good enough to telephone or write our distributor, Mr. LeVecke, and give him the name and address of the supermarket where you shop. He will promptly follow through and get that market to handle our beers. You can be of material help to your company by reporting such cases to Mr. LeVecke promptly.”

And again on page 78 in a letter addressed to the Shopping Bag Stores, Mr. Jones points out to that company that Mr. LeVecke was the representative of the Griesedieck Western Brewery Co.:

“I sincerely appreciate the time you gave our representative, Mr. William LeVecke, and myself on my recent visit to Los Angeles. It does a lot of good to exchange ideas with outstanding merchants like yourself. Mr. LeVecke and I called on approximately 20 of your stores and made a survey that was most comprehensive \* \* \*.”

In a letter to Mr. John L. Hamilton, Pacific Mercantile Company, 461 Market Street, San Francisco, Mr. Jones again holds out Mr. LeVecke as the representative of the Griesedieck Co:

“Our representative, Mr. William LeVecke, reports getting our beers established in your good firm.

We are most appreciative of this and you may be sure that we at the brewery will follow this account and do everything we can at this end to give you good service and satisfaction.”

On page 82 of the transcript, Mr. Jones writes to Mr. Lawrence R. Graefe, Bob’s Market, Torrance, California, soliciting his business as follows:

“We recently learned through the Co-operator that you are one of the new members of the Certified Grocers Association.

We are one of the suppliers for Certified Chain and we enjoy exceptionally fine business from the Certified group. Our products are Stag beer and Hyde Park ‘75’ beer.

Our representative is Mr. William LeVecke, 1807 East Olympic Boulevard, Los Angeles, California, telephone VanDyke 7944.

If you are not handling our products, a telephone call to Mr. LeVecke will be an easy way to get acquainted with our profitable line for distribution in your neighborhood.”

Then Mr. Jones notes that the attached letter was sent to a group of people whose names appear on pages 82 and 83 of the transcript.

On page 84 of the transcript Mr. Jones’ letter to the Safeway Stores, Inc., Phoenix, Arizona, appears in which Mr. Jones says:

“I sincerely appreciate the time you gave our representative, Mr. William LeVecke, and myself on our recent visit to Phoenix. It does us a lot of good to exchange ideas with outstanding merchants like yourself.

Mr. LeVecke and I called on 68 Safeway stores and made a survey that was most comprehensive, starting in Tucson and ending in San Francisco.”

Again on page 85, Mr. Jones is urging the United Grocers in connection with the sale of Griesedieck products. He says:

“I should like to emphasize that we are on the Pacific Coast to stay, and as revealed in our financial statement that I gave to your Mr. Sorensen, you will believe me when I say that we are financially responsible to carry out our obligations to you and your dealers.

If you have any ideas as to how we may make our association more profitable and if you can suggest how it will function more smoothly, please command me.”

On page 86 of the transcript, Mr. Jones is again soliciting business in a letter addressed to Mr. Henry J. Carthy, Los Angeles, California:

“It was a pleasure to meet you in Mr. Campbell Stewart’s office the other day. I regret that I did not have more time to tell you about our company and our products. However, our Mr. LeVecke and the Certified group no doubt have acquainted you with our organization.

I would like to reiterate that we are on the Pacific Coast to stay, and if you will inspect our financial statement, you will find that we are financially responsible and that we can carry out our responsibility to your good organization.”

On page 87 of the transcript, Mr. Jones’ letter to A. D. Murrell, Los Angeles, California, he says:

“We are on the West Coast to stay.”

On page 88 of the transcript, Mr. Jones' letter to Mr. Charles Von Der Ahe, Von's Market, Culver City, California: In this letter Mr. Jones points out that he attempted to call upon Mr. Von Der Ahe while he was in Los Angeles; that he visited several of the Von stores; that Griesedieck Western Brewery Co. has been on the Pacific Coast with its products, Stag and Hyde Park "75" for over a year.

"Our business is increasing every day. It might interest you to know that we ship a carload a day into the California area, and I would also like to emphasize that Stag and Hype Park '75' are premium products."

On page 90 of the transcript, Mr. Jones is writing to the Certified Grocers of California in Los Angeles:

"I sincerely appreciate the time you gave our representative, Mr. William LeVecke, and myself on my recent visit to Los Angeles. \* \* \*

I again want to thank you and your organization for the fine business you have been entrusting to us and you may be sure we appreciate this confidence.  
\* \* \*

Mr. LeVecke and I have made a comprehensive survey of the Los Angeles area on beer sales and beer distribution \* \* \*."

The matters set forth that were contained in the affidavit of Mr. William R. LeVecke and the matters that set forth that were attached to the affidavit of Reed LeVecke and marked Exhibit "A" were not contradicted by Griesedieck Western Brewery Co. or Carling Brewing Co. These statements show that Griesedieck Western Brewery Co. did solicit business over a period of four

years in the State of California in cooperation with their representative, Mr. William R. LeVecke; they built their business commencing in 1950, from zero, to the place where, as pointed out, and not denied, in the affidavit of William R. LeVecke, transcript, page 69,

“that defendant Griesediecke Western Brewery Co. kept a steady flow of its beer products coming into the State of California between 1950 and November 30, 1954; that the business of said defendant was increased every year until during the year 1954, it became fifth in size of business done in the State of California among all breweries which imported beer into this State.”

To argue in the face of this that the defendant Griesedieck Western Brewery Co. was not doing business in the State of California is to ignore all of the decisions that have followed the case of the *International Shoe Company v. Washington*, 326 U. S. 310, 90 L. Ed. 95; 66 S. Ct. 154.

The appellees here argue that while the California cases have adopted the “mere solicitation” rule in firm language, that nevertheless, this is not what the court meant, that what the courts of California meant to do was to go to the same point to which the court went in the case of *Frene v. The Louisville Cement Company*, 134 F. 2d 511 (1943). In that case the court discussed at great length all of the cases leading up to the *International Harvester Company v. Kentucky* and pointed out that the Supreme Court had forecast the abandonment of the solicitation plus rule, but that it was not necessary in *Frene v. The Louisville Cement Company* to go any further than to say that the abandonment of this rule would logically follow the *International Harvester Company v.*

*Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479, that in *Frene v. The Louisville Cement Company* the evidence showed solicitation plus.

This is also true in the case at bar. The evidence shows solicitation plus. It shows Mr. Jones, the President of the defendant Griesedieck Western Brewery Company, making four annual visits to the State of California, calling on all of the people in the State of California who were retailing the products of his company, calling on the buyers of these various organizations, making an effort to make a favorable contact with Lucky Stores Company in San Francisco through a friend that he had in the First California Company who in turn introduced him to Mr. Dardi, Chairman of the Board of Directors of Lucky Stores Company. We have Mr. Jones' letters covering four years, to various retail outlets in the State of California, to the chain markets, to Certified Grocers, to United Grocers and to Safeway Stores pointing out that Mr. Jones along with "our representative" William R. LeVecke, had made a most comprehensive survey of beer sales in the State of California and that if they desired any information with respect to this survey they could write to Mr. LeVecke and he would give them "excerpts" from the survey, not the survey itself, that being the property of Griesedeick Western Brewery Co., and made by Jones in the State of California accompanied by our representative Mr. LeVecke for the use and benefit of Griesedieck Western Brewery Co.

These facts destroy the four specific arguments made by the appellees: (1) that Mr. Jones, as the President of the Griesedieck Western Brewery Co., did not solicit busi-

ness in the State of California; (2) that there was not solicitation plus if that be necessary; (2) that there was conflict in the evidence with respect to the question of solicitation or solicitation plus; (4) the appellants lifted themselves by their own bootstraps to make themselves or attempt to make themselves the agents of Griesedieck Western Brewery Co. in the State of California.

**Griesedieck Western Brewery Co. Held Out to All the People With Whom They Were Doing Business and From Whom They Were Soliciting Business That the Appellants Were Their Representatives in the State of California.**

Mr. Jones, the President of Griesedieck Western Brewery Co., in his correspondence with United Grocers, Certified Grocers, Safeway Stores and the various chain stores and individual stores handling the products of the Griesedieck Western Brewery Co. in California, pointed out to each one of them that Mr. LeVecke was a representative of Griesedieck Western Brewery Co.

It is not necessary that we reiterate in this closing brief the cases cited by us in our opening brief, which cases follow to its logical conclusion the holding of the Supreme Court of the United States in the *International Shoe Company v. Washington, supra*, that

“in the more recent decisions solicitation without more constitutes doing business within a state when the solicitation is a regular, continuous and substantial course of business.”

This quotation is set forth in *Jeter v. Austin Trailer Equipment Company*, 122 Cal. App. 376 and it is lifted intact from *Koninklijke L. M. v. The Superior Court*, 107 Cal. App. 2d 495.

In the case at bar, we have solicitation carried on in a regular and continuous and substantial manner by Mr. Jones, the President of Griesedieck Western Brewery Co. both by his presence in California during his annual trips to this State in the promotion of the business of the Griesedieck Western Brewery Co. and in the letters attached to the affidavit of Mr. Reed LeVecke and set forth commencing at page 75 of the transcript going through to page 97 in which letters for a period from 1951 to 1954 he was soliciting business for his company in the State of California. That this constitutes a "regular, continuous and substantial course of business" cannot be doubted.

### **Carling Brewing Co.**

With reference to the appellees' brief responding to the argument covering the activities of the Carling Brewing Co. in the State of California, there is really nothing that need be added to appellants' opening brief. The affidavit of the President of the Carling Brewing Co. [Tr. pp. 51 to 58] shows that the Carling Brewing Co. was not only soliciting business in the State of California, but that they were aiding and assisting retail agencies, in the development of that business, and the sale of their product, that they inspected the records of the distributors, checked on their volumes of sales, directed the distributors how they had to keep their records, recommended the use of various sales material. In other words, they brought themselves in this affidavit clearly within the solicitation plus rule.



We respectfully submit that by reason of the abundant uncontradicted and conclusive facts established in this matter, that the District Court's order on the motion quashing service of summons and complaint on the appellees should be reversed and that the appellees should be required to answer the complaint and proceed to trial.

Respectfully submitted,

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